

APR 9 1947

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1226

1225

JOHN J. CASALE, INC.,

Petitioner,

vs.

LOREN SKIDMORE, THOMAS McKASEY, CONRAD A. FUGMAN, BENJAMIN TROTTIE, JOHN SCHRANKO, THEODORE DRIMONAS, JACOB KNOL, CAMERON OLTON, ROGELIO M. LOPEZ, GEORGE STENGLE, AXEL SWENSON, JOHN R. RUSIECKI, LEON JOHNSON, GEORGE SHEFTICK, ROBERT I. MITCHELL, WARREN WELLS, GEORGE SARIS, MICHAEL GARCIA, JOHN DODSON, FELIX J. DOCOBO, DANIEL C. SWEENEY and THOMAS O'DONNELL, suing in behalf of themselves and other employees similarly situated,

Respondents.

JOHN J. CASALE, INC.,

Petitioner,

vs.

JOSEPH MOONEY, HARRY SMITH, MARVIN H. WILSON, JOHN JORDAN, DAVID DAVIDSON, JOHN EHRET and FRED ROHLEDER, suing in behalf of themselves and other employees similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

CHARLES E. COTTERILL,
70 East 45th Street,
New York City,
Attorney for Petitioner.



INDEX

	PAGE
Petition	1
Summary Statement of Matter Involved.....	2
Jurisdictional Statement.....	6
Questions Presented.....	6
Reasons Relied on for Allowance of Writ.....	7
ARGUMENT:	
Summary of Argument.....	9
DISCUSSION:	
The need for an employer to have been engaged in interstate commerce	10
Conflict of Decisions as to the Need for the Employer to Have Been Engaged in Interstate Commerce..	14
The Petitioner Did Not Operate an Instrumentality of Interstate Commerce.....	14
Employees of the Lessor of Business Property Are Not Caused to be Engaged in Interstate Commerce Merely Because Some of the Lessees May Use the Leased Property in Their Own Interstate Com- merce. The Boutell Case is Not to the Contrary..	15
The Compensable Overtime Unit Under This Statute is the Period Beyond Forty Consecutive Hours in any One Week. For an Individual Employee to Recover for any Particular Week He Must There- fore Show by Proof That During That Particular Week He Was Engaged in Interstate Commerce. It is not Enough to "Infer" That He Might Have Been so Engaged That Week.....	18
Conclusion	21

CASES CITED

	PAGE
<i>Armour & Co. v. Wantock</i> , 323 U. S. 126.....	13
<i>Boutell v. Walling</i> , 327 U. S. 463.....	16
<i>Johnson v. Dallas Downtown Development Co.</i> , 132 F. 2d. 287.....	16, 17
<i>Lewis v. Florida Power and Light Co.</i> , 154 Fed. 2d. 751	8, 14
<i>Mabee v. White Plains Publishing Co.</i> , 327 U. S. 178	11
<i>Overstreet v. North Shore Corp.</i> , 318 U. S. 125.....	14
<i>Petersen v. J. F. Fitzgerald Construction Co.</i> , 318 U. S. 740.....	16
<i>Schwarz vs. Witwer Grocery Co.</i> , 141 Fed. 2d. 341, certiorari denied, 322 U. S. 753; 49 F. Supp. 1003..	8, 18
<i>Super-Cold Southwest Co. v. McBride</i> , 124 Fed. 2d. 90	8, 18
<i>10 East 40th Street Building v. Callus</i> , 325 U. S. 578	17
<i>Walling v. Jacksonville Paper Case</i> , 317 U. S. 564...	11
<i>Wilson v. R. F. C.</i> , 158 F. 2d. 564	8, 14

STATUTES

Fair Labor Standards Act of Congress:	
Sections 7(a) and 16(b).....	2, 7
Act of February 13, 1925 (C. 229; 43 Stat. 936)	
amending the Judicial Code, Section 240(a), Title 28 U. S. C. A., Section 347(a).....	6

MISCELLANEOUS

Rule 38, subdivision (5) of the Rules of the Supreme Court	6
---	---

Supreme Court of the United States

October Term, 1946

JOHN J. CASALE, INC.,
Petitioner,
vs.

LOREN SKIDMORE, THOMAS MCKASEY,
CONRAD A. FUGMAN, BENJAMIN
TROTTIE, JOHN SCHRANKO, THEODORE
DRIMONAS, JACOB KNOL, CAMERON
OLTON, ROGELIO M. LOPEZ, GEORGE
STENGLE, AXEL SWENSON, JOHN R.
RUSIECKI, LEON JOHNSON, GEORGE
SHEFTICK, ROBERT I. MITCHELL,
WARREN WELLS, GEORGE SARIS,
MICHAEL GARCIA, JOHN DODSON,
FELIX J. DOCOBO, DANIEL C. SWEENEY
and THOMAS O'DONNELL, suing in
behalf of themselves and other
employees similarly situated,
Respondents.

No.

JOHN J. CASALE, INC.,
Petitioner.

vs.

JOSEPH MOONEY, HARRY SMITH, MARVIN
H. WILSON, JOHN JORDAN, DAVID
DAVIDSON, JOHN EHRET and FRED
ROHLEDER, suing in behalf of themselves
and other employees similarly
situated,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS, FOR THE
SECOND CIRCUIT, AND BRIEF IN SUPPORT
OF PETITION**

To the Honorable Fred M. Vinson, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved

These were consolidated actions against petitioner, John J. Casale, Inc., instituted against it in the United States District Court for the Southern District of New York by various of its employees claiming of it unpaid overtime compensation, penalties and counsel fee as if warranted by Sections 7 (a) and 16 (b) of the Fair Labor Standards Act of Congress. The opinion of the District Court was rendered April 29, 1946, and is reported at 66 Fed. Supp. 282. The judgment of the District Court was entered September 11, 1946 (Rec. 481). The opinion of the Circuit Court of Appeals for the Second Circuit was rendered March 6, 1947, and the judgment of that Court was entered March 6, 1947. The opinion of that Court is not yet officially reported.

The District Court concluded that all the suing employees, except two, were entitled to judgment against the petitioner. The Court of Appeals affirmed as to those in whose favor a judgment had been entered, but reversed (in his favor) and remanded as to employee Dodson with respect to a certain period of time and place of occupation.

The petitioner corporate employer was, throughout the years involved, the legal owner of a very large number of freight motor trucks in New York City, amounting to around 500 in 1938 and having become more than 1000 by 1946. But the corporation did not *operate* any of those trucks. It leased them out, under long term written leases, to about 70 business concerns in New York City, who in turn operated and used them exclusively in their own company local delivery of their own commodities which previously had been completely manufactured. The petitioner was paid by its lessees an agreed fixed amount of rental regardless of the extent of use of the leased property, plus a small amount of extra rental based upon the amount of mileage used by its respective lessees.

The truck vehicles were at all times operated by and under the sole direction and control of the lessees. The

petitioner did not have any responsibility for the accomplishment of any freight transportation in those vehicles by the lessees nor was it liable for any loss, damage, theftage or delays of freight cargoes resulting from any transportation performed by these vehicles. It did not even have knowledge of what or when or how much freight was put by the lessees into the leased vehicles, or between what places and when the vehicles were moved by the lessees in making deliveries of their finished goods.

The petitioner did not select its individual lessees with knowledge of or with any concern as to whether or not any of its truck vehicles would be used by them in their own local interstate or intra state commerce respectively, or in what proportions. The vehicles leased by it were identifiably assigned to each of the particular lessees respectively, painted solely with the names and advertising matter of those individual lessees, and used by those respective lessees as they pleased without any restriction other than that the vehicles should be confined to uses in the regular businesses of the lessees.

Being the legal owner of the leased property, and wishing to preserve its capital value, the petitioner stipulated in all its leases that it, alone, and out of the rentals paid to it, would do any needed repairing, cleaning and greasing of the vehicles, and their fueling. To that end the petitioner possessed various truck garages in New York City to which it required that the lessees should return the vehicles for at least four hours in each period of twenty-four unless otherwise agreed. It was during such periods that the petitioner's own employees examined the vehicles to determine their condition, washed them, greased any of them when needed, and kept the fuel tanks filled.

Also periodically (based on the extent of vehicle mileage consumed) each vehicle was withdrawn from the lessees' use and another substituted, during which times the petitioner would completely overhaul the withdrawn vehicle in its mechanical shop. To that end it employed a number of mechanics, and whose labor also was used when occasionally any one of petitioner's vehicles might have suddenly broken

down or been in an accident requiring major repairs at once.

To the extent that petitioner as the lessor furnished gasoline, oil and tires for its leased vehicles, the City of New York deemed them sales of commodities and exacted from lessees of the petitioner a City sales tax.

The suing employes of petitioner are, variously, its mechanics, washers and greasers above mentioned.

As a part of their evidence, the suing employes established that they individually worked for long stretches of time at some one or another of the particular truck garages of the petitioner; they showed the kind of work they respectively did; they showed that the trucks of a particular lessee would be invariably kept in a particular garage; and they showed the compensation paid to them by petitioner and the hours they worked.

In addition they showed that numerically most of the lessees of the petitioner used the vehicles leased by them exclusively in their *intrastate* commerce wholly within New York City. It appeared, however, that others of such lessees did to *some* extent use *some* of their leased vehicles in their local interstate commerce between New York City and across the Hudson River in New Jersey. Also to a very small extent some of the vehicles also were used by a few of the lessees in their local New York City haulage of interstate or foreign goods of their own to or from railroad or truck stations or water piers in New York City.

Basing their calculations solely upon the respective number of *miles* of the truck uses the suing employes established through evidence obtained from various of the lessees of petitioner that of all the truck vehicles usually stored at any one of the petitioner's garages some would never be used by the lessees in that local interstate commerce, others would be occasionally, and still others to some extent regularly. The District Court found from such evidence that, taken as a whole, based upon the respective mileages of truck operations by the lessees, in the aggregate 20% to 25% of that mileage was interstate but of course variable as

between lessees, times, individual vehicles, and as between those stored in the separate garages.

The District Court and the Circuit Appellate Court did not find, nor was there any evidence offered enabling a finding, as to which particular truck vehicles were used by the lessees at any particular time in their interstate commerce, or during what particular periods of time did any particular one of the suing employes perform any labor with relation to any particular truck vehicle so currently used by a lessee in its interstate commerce. While no one of the suing employes was assigned to work concerning any particular vehicles, with reference to their use in interstate or intra-state commerce by the lessees, no effort was made to establish that during any particular week or longer that any particular such employe performed any work connected with one or more particular vehicles in recurrent interstate use at the time by a lessee of the petitioner.

The District Court concluded that it would make no difference under the foregoing facts that the petitioning company was not itself engaged in interstate commerce, because (it said) had the suing employees been employed by the lessees instead of the petitioner, then the character of work done by them would have caused them to be engaged in interstate commerce of the lessees. It was also concluded by the District Court that no burden rested upon the suing employes to establish that during any particular period of time they actually performed any labor for petitioner related to vehicles recurrently used by the truck lessees in their own interstate commerce inasmuch as their labor was not *required* to be segregated.

The Circuit Court of Appeals for the Second Circuit affirmatively decided that the petitioning company was *not* itself engaged in interstate commerce. It also decided that petitioner corporation was not itself *operating* any instrumentality of interstate commerce. It was concluded, however, that inasmuch as a motor truck *when used by a lessee* in its own commodity deliveries, might be so used by it in interstate commerce, then that the individual truck vehicle

itself, although operated by the lessee, would be a machine used in interstate commerce. From that, it was held, it resulted that the suing employes of petitioner would be deemed under the statute engaged in interstate commerce because, although performing their labor locally for the *petitioner*, that labor related to vehicles used by the lessees of petitioner in their own interstate commerce in an *aggregate* substantial amount.

As to the complete failure of the suing employes to identify their labor with regard to any particular period of time in relation to any particular vehicles then currently used by the lessees in their interstate commerce, the Circuit Court of Appeals concluded that such failure was not material under this statute because the suing employees performed their labor indiscriminately without special assignment to particular vehicles as if depending upon their interstate or intrastate use by the lessees, that the aggregate over-all interstate use of the vehicles was "substantial" and that it therefore was proper to "infer" labor each week within the coverage of the statute.

Jurisdictional Statement

It is respectfully submitted that the United States Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925, (C. 229; 43 Stat. 936) amending the Judicial Code, Section 240 (a), Title 28 U. S. C. A., Section 347 (a); and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented

The principal issues to be resolved by the Supreme Court are these:

(1) When no question of "production for commerce", as legislatively defined in this statute, is involved, and when an employer, sued under this statute, does not itself *operate*

any instrumentality of interstate commerce, can its own employes be deemed engaged in interstate commerce when the employer itself is not so engaged?

(2) When the lessor-owner of property assumes under its leases the responsibility for keeping its leased property in good serviceable condition and appearance are the employes of that lessor-owner deemed to be engaged in interstate commerce because some of the lessees chose in varying degrees to use the property leased by them in their own separate interstate commerce?

(3) Because those employes of the lessor-owner performed their tasks for the petitioner indiscriminately without regard to whether the leased property was or was not used by the lessees in their own interstate commerce may those employes recover against their employer without each showing for himself whether or not during any particular work week he did actually perform his labor upon any such property which a lessee may have used in the interstate commerce of the lessee, even if it were immaterial whether the petitioner was engaged in interstate commerce?

Reasons Relied on for Allowance of Writ

1. No one of the stated questions has heretofore been directly decided by this Court in a case involving "commerce" as distinguished from "production for commerce". The first two are questions of substantive importance in respect to the application or non-application of the Fair Labor Standards Act to labor upon locally leased property by employees of a lessor-owner when some part of the use of the leased property by the lessees is for their own separate interstate commerce. The third of the questions presented is of equal national importance because it goes to the point of inquiry as whether or not a laborer, if deemed at times to be engaged in interstate commerce and at other times not, is required by competent proof to demonstrate

which of his previous work weeks did include labor in any such interstate commerce.

2. On the questions here involved there is direct disagreement between the Circuit Courts of Appeal which have dealt with them, and with respect to those questions consistent administration of the statute requires their authoritative determination by this Court.

3. Thus, as to whether suing employees can ever be deemed to have been engaged in interstate commerce, when their employer was *not* so engaged, the Fifth Circuit Court of Appeals holds in the light of recent decisions of this Court that before an employee can be deemed to have been engaged in interstate commerce his own employer must have been so engaged, and that even if an employer was so engaged, it would be the particular work of the suing employee and not the general business of his employer which would be determinative (*Lewis vs. Florida Power etc.*, 154 Fed. 2d 751; *Wilson vs. R. F. C.*, 158 Fed. 2d. 564. The Second Circuit Court of Appeals in the present case, however, holds that although the petitioning employer was *not* engaged to any extent at all in interstate commerce and did not itself *operate* any instrumentality of interstate commerce, yet that such legal circumstance is immaterial under this statute.

As to the other important question here involved the Eighth and Fifth Circuit Courts of Appeal hold that when the labor of a suing employee was indiscriminately but in part in intrastate commerce and in part in interstate commerce, and it was separable in the respective periods of time devoted to each, the "week" is the unit of application of this statute, and it must be shown as to any individual suing employee that during any given week his particular labor consisted of interstate commerce (*Schwarz vs. Witwer Grocery Co.*, 141 Fed. 2d. 341, certiorari denied, 322 U. S. 753; *Super-Cold S. W. Co. vs. McBride*, 124 Fed. 2d. 90-92). The Second Circuit Court of Appeals in its decision in the present case, holds, however, that if, through a stretch of

many weeks, the aggregate interstate work of an individual employee was "substantial" and the employee worked indiscriminately in interstate or intrastate commerce, the suing employee need not identify the *particular* weeks during which his work was in any "substantial" part interstate and those in which it was not because it is permissible to "infer" devotion to interstate commerce each week.

ARGUMENT

Summary of Argument

Certiorari should be granted for the reason that:

POINT I

Unlike its distinctive legislative definition of "production for commerce" Congress did not in this statute define "commerce" so as to include "any process or occupation necessary to commerce". Congress did not, in this statute, regulate those whose business or labor only "affects" interstate commerce. It therefore results that if a sued employer was not *itself* engaged in interstate commerce and did not *operate* an instrumentality of interstate commerce then no labor performed for it by any of its own employees *could* have been in interstate commerce.

POINT II

A lessor of property has the right through its own employed labor to maintain the capital value of its leased property and to keep it in good appearance and operating condition. Because the lessee benefits therefrom that added expense of the lessor may be embraced within the whole rental. But because some of the lessees variably may choose to some extent to use the leased property in their *own* interstate commerce that does not cause the employees of the lessor themselves to be engaged in interstate commerce because of their work for the lessor in maintaining the employer's leased property.

POINT III

Even if an employer was engaged in interstate commerce, or even if it was immaterial whether he was or not, unless an employee suing under this statute shows by his evidence in what particular weeks he was engaged in interstate commerce then he may not recover at all, especially when, as here, the record so clearly shows that while the labor of each individual employee was indiscriminate as between vehicles used in intra or interstate commerce of the lessees there was no inherent reason why as to any particular employee there should have been any interstate labor by him during any one or another of any particular week.

DISCUSSION

The need for an employer to have been engaged in interstate commerce.

The Court below expressly concluded that the petitioner corporation, the employer which has here been sued, was not itself engaged in interstate commerce, or in the production of goods for commerce, or in the *operation* of an instrumentality of interstate commerce. That, it was held, is not material, even though it was said that a minimal amount of engagement in interstate commerce by the employer "will suffice for the purposes of classifying the employer". Here there was no "minimal" engagement in interstate commerce by the employer!

The attention of the Court below, both in brief and argument, was particularly directed to the fact that it is the business employers who are being regulated by this Federal statute which was enacted under the constitutional authority to regulate interstate commerce. Congress chose in this statute not to regulate those activities which merely "affect" interstate commerce except to the extent embraced within the distinctive and elaborated legislative definition

of "production of goods for commerce". When, therefore, in such a case as this the application or non-application of the statute turns entirely upon the question whether the suing employees were engaged in interstate commerce it would seem impossible that they *could* have been when their own employer was *not*. It would be a contradiction of thinking to suppose that a corporate employee, as the agent of his employer, could engage in tasks that would, as to him, be interstate while at the same time the principal (his employer) as to those same activities was *not* engaged in interstate commerce.

The decisions of the Supreme Court of the United States in the recent cases of *Walling v. Jacksonville Paper Case*, 317 U. S. 564, and *Mabee v. White Plains Publishing Co.*, 327 U. S. 178, were put before the Court below. In the *Jacksonville Paper* case the whole inquiry of the Supreme Court was directed to the determination of what parts of the business of the sued *employer* were interstate and which were not. To make those determinations the Supreme Court said—

"entails an analysis of the various types of transactions and particular course of business along the lines we have indicated".

Some of the business of the *Jacksonville Paper Company* it decided to have been interstate and some not. The Supreme Court then went on to say:

"The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent upon the character of the employees' work".

In *Mabee v. White Plains Paper Company* the whole inquiry of the Supreme Court was likewise directed to the question whether the employer publishing company was engaged in the "production of goods for commerce" within contemplation of law. The Supreme Court comprehensively

dealt with that question and resolved it in the following statement of ultimate conclusion:

“We hold that respondent (employer) is engaged in the production of goods for commerce”.

Immediately following that stated determination the Supreme Court then took pains to say that it did not result that the particular suing employees were there covered by the Act. That, the Court said, would depend upon the nature of their own duties in relation to the small amount of “production for commerce” in which the defendant employer was there held to have been engaged. Having first concluded that the White Plains Publishing Company was itself as a business employer engaged in such “production” the Supreme Court then immediately added:

“That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent upon the particular character of their work”.

The essential principle of *Kirschbaum v. Walling* is not here being drawn in question. That early decision concerned activities which were held to consist of “production of goods for commerce” under the extended and very expressly chosen legislative definition of the term “produced” in the statute. The loft building owner in that case was just as much engaged in production of goods for commerce within that legislative definition as were its employees. If the running of the elevator there involved was an “occupation necessary” to that garment production the employer providing that elevator service was as much engaged in the “production” as its own agent employees who manipulated the elevator controls.

But even when dealing with cases involving the legislative definition of “production” the nature of the employer’s business is at least of “weight”. Thus it was

said in the recent decision of the Supreme Court in *Armour & Co. v. Wantock*, 323 U. S. 126:

"The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum v. Walling* that it might not always be decisive".

When, however, dealing with cases not in any way involving a claim of "production for commerce" there will not be found in the statute any language defining the term "commerce" so as to embrace "processes or occupations necessary to" interstate commerce. Therefore, to be "engaged in commerce" means precisely that and nothing else. Merely to "affect" interstate commerce would not suffice for coverage under this Act. Expressly did Congress reject all efforts made to induce it otherwise.

It therefore results that unless an employer which has been sued was *itself* engaged in interstate commerce or *operated* an instrumentality of interstate commerce no one of its employee agents *could* have been engaged in interstate commerce or in the operation of an instrumentality of interstate commerce within any constitutional or statutory concept that would be possible.

The Court below very expressly invited the issue in this respect by candidly dealing with the case as one not involving an employer engaged in interstate commerce or operating an instrumentality of interstate commerce. By indirection, however, its ultimate conclusion of coverage would simply supply by judicial decision the equivalent of amendatory legislation reversing a deliberate policy which Congress chose despite consistent efforts to persuade it otherwise.

Conflict of Decisions as to the Need for the Employer to Have Been Engaged in Interstate Commerce

The Court below (the 2nd Circuit Court of Appeals) appreciated that its point of view was directly opposed to that of the 5th Circuit Court of Appeals on the foregoing question. The decision of that Circuit Court of Appeals in *Lewis v. Florida Power and Light Co.*, 154 Fed. 2d 751, was pressed upon the notice of the 2nd Circuit Court of Appeals. In the *Lewis* case the 5th Circuit Court of Appeals had recently held:

"While the nature of the employer's business is not determinative of the rights of employees under the Act, because the application of the Act depends upon the character of the employees' activities (*Overstreet v. North Shore Corp.*, 318 U. S. 125) nevertheless unless an employer is 'engaged in commerce', or 'engaged in the production of goods for commerce' the employees are not 'engaged in commerce' or 'engaged in the production of goods for commerce'. (*Mabee v. White Plains Publishing Co.*, 327 U. S. 178). Therefore it is proper to inquire whether the Court below erred in its holding that the defendant is neither engaged in 'commerce' nor engaged 'in the production of goods for commerce'."

To the same effect was that court's still more recent decision in *Wilson v. R. F. C.*, 158 F. 2d 564.

When writing the opinion for the Court in the present case Judge Frank purposely made no mention of the point of view of the 5th Circuit Court of Appeals with reference to the need for an employer to have been engaged in interstate commerce.

The Petitioner Did Not Operate an Instrumentality of Interstate Commerce

Both the District Court and the 2nd Circuit Court of Appeals seemingly were influenced by *Overstreet v. North Shore Corp.*, 318 U. S. 125. By closely divided vote the

Supreme Court had there concluded that while the business of operating an interstate bridge and toll road was not itself interstate commerce yet that certain employees of the employer in that case could recover under that Act. There, however, the need for the employer to have been engaged in interstate commerce was apparently dispensed with because of the conclusion of the Supreme Court that the employer was *operating an instrumentality of interstate commerce*. The employees of the bridge company were the agents through whom the bridge company accomplished its business purpose not only of supplying but of *operating* those two stationary facilities. Here, in the present case, the 2nd Circuit Court of Appeals noted that it is not the petitioning employer who operated the truck vehicles. It did not, however, deem that circumstance consequential. *Instead it proceeded on the hypothesis that the suing employees would have been engaged in interstate commerce had they worked for the lessees of the trucks who did do the operating of them instead of for the petitioner. And that alone was deemed enough.*

Employees of the Lessor of Business Property Are Not Caused to be Engaged in Interstate Commerce Merely Because Some of the Lessees May Use the Leased Property in Their Own Interstate Commerce. The Boutell Case is Not to the Contrary

It is a common incident of the ownership of leased property that the lessor, through employees of its own, often prefers to keep up its capital value by keeping it in good usable condition at its own expense. Motor trucks would rapidly lose their value and often be unfit for service unless a high standard of maintenance, both preventive and repair, as well as appearance, be practiced. The owner of such trucks, permitting them to be used and operated by lessees, would soon find its property badly neglected if most lessees were responsible for their care and upkeep.

The Court below, failing to observe the underlying distinction in that regard, stated its view that the decision in *Boutell v. Walling*, 327 U. S. 463, "is most closely analogous to the instant case". But there, like *Petersen v. J. F. Fitzgerald Construction Co.*, 318 U. S. 740, the *business* of that employer was the repairing of property owned and operated by certain public utilities—a motor truck common carrier in the one instance and a railroad company in the other. Each of those public utilities was essentially interstate in character. They were unmistakably "instrumentalities of interstate commerce". In such cases (the Supreme Court said) those activities are interstate.

Here, however, the Court below did not observe the distinction that in the present case the labor of the suing employees was (1) in behalf of and upon the property of their own employer and (2) the individual lessees of the trucks did not remotely correspond to public utilities or "instrumentalities of interstate commerce" in the familiar sense of toll bridges, railroads, public motor carriers or telephone or telegraph companies. Those lessees of the trucks in the present case were business concerns which merely used their leased truck vehicles for local deliveries of their own previously manufactured goods, chiefly in New York City but to some extent across the Hudson River on the New Jersey side of New York Harbor.

The 5th Circuit Court of Appeals decided in *Johnson v. Dallas Downtown Development Co.*, 132 F. 2d 287, that the owner-lessor of property, having no other business, would not be engaged in interstate commerce (no production being involved) because it leased its property to a number of others some of whom to some substantial extent were, on their own accounts, engaged in interstate commerce and used the leased property in conducting it. That being so (that Court held) it resulted that those employees of the owner-lessor who maintained the leased property in service condition would not be engaged in interstate commerce. The Supreme Court declined certiorari, 318 U. S.

790. Similarly the Supreme Court of the United States in *10 East 40th Street Building v. Callus*, 325 U. S. 578, dealt with leased property in a case wherein the suing employees worked for the property owner who was not itself engaged in interstate commerce but some of whose lessees were. The workers there suing were maintenance employees whose labor concerned the upkeep of the leased property used by others in their own interstate commerce. The Supreme Court in a very pointed choice of language held:

"Obviously they (the employees) are not 'engaged in commerce'."

The interstate lessees in the *Johnson* and *Callus* cases received, in their property rentals, the benefits of the labor of the employees of the property owners. Here, in the present case, the lessees of the petitioning property owner, likewise received the benefits of the fact that it is their lessor who keeps its leased property in serviceable condition through employees of its own.

Boutell v. Walling could not have been intended by the Supreme Court of the United States to qualify those of its previous decisions dealing with leased properties. It goes far enough to say (as it was in *Boutell*) that the employees of an independent contractor, working upon the property *owned and operated by an instrumentality of interstate commerce*, may thereby become a part of that interstate commerce. But here neither the petitioner nor its lessees were operating "instrumentalities of interstate commerce" in the sense of any meaning heretofore ascribed to that conception. Nor, here, was the petitioner *operating* any vehicles at all or otherwise engaged in interstate commerce. Neither it nor its employees were engaged in the business of servicing transportation machines belonging to others. The suing employees worked for the petitioner, and that work was upon vehicles *owned* by the petitioner and used by it in its *own* business of merely leasing truck vehicles to others.

The Compensable Overtime Unit Under This Statute is the Period Beyond Forty Consecutive Hours in any One Week. For an Individual Employee to Recover for any Particular Week He Must Therefore Show by Proof That During That Particular Week He Was Engaged in Interstate Commerce. It is not Enough to "Infer" That He Might Have Been so Engaged That Week.

The Court below is in direct conflict with the 8th and 5th Circuit Courts of Appeal on an important question not heretofore directly decided by the Supreme Court.

In *Schwarz v. Witwer Grocer Co.*, 49 F. Supp. 1003, a District Court of the United States gave judgment under this statute for a corporate defendant upon the ground that

"The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed".

The 8th Circuit Court of Appeals affirmed in 141 Fed. 2d 341. The Supreme Court of the United States denied certiorari in 322 U. S. 753. The Court of Appeals observed that some of the work done by the suing employees was interstate and some not. Speaking of the interstate work that Court said:

"* * * When they did that or how much time they gave to that work does not appear. * * * It would seem to be elementary that an employee seeking to recover under the Act should be required to prove that he comes within its terms: (a) that he was an employee 'who is engaged in commerce' and (b) how many hours he has been so engaged".

The 5th Circuit Court of Appeals in *Super-Cold Southwest Co. v. McBride*, 124 Fed. 2d 90, having before it the same problem held:

"An employee * * * working both interstate and intrastate must point out what part of his work was in intrastate and what part in interstate commerce".

In the present case, however, the holding of the Court below was that it is permissible to "infer" engagement in interstate commerce by a suing employee where—

"there was no evidence that the work on the trucks used in interstate commerce was separate from that on trucks used only intrastate, and it appears that all the employees worked on all the trucks housed at the garages in which they were employed. The trial judge found that the work on these trucks was constant and not sporadic; and it was proper for him to infer, *** that each of the employees spent a substantial amount of time on trucks used in interstate commerce."

The conflict here between the several Circuit Courts of Appeal is direct and goes to a fundamental question. The facts found in this connection were that of the *total* mileage of *all* the leased trucks somewhere around 25 per cent of it was performed by various of the lessees in their own interstate local deliveries. Each of the suing employees of the petitioner, it was further found, devoted his labor continuously to first one and then another of the motor trucks so owned and leased out by the petitioner. A theoretical average therefore would indicate that not more than 25 per cent of the whole time of an individual suing employee in the course of a given *year* or *month* would concern vehicles used to *any* extent whatsoever by lessees in interstate commerce. As the prohibition of the statute is against uncompensated hours beyond 40 in any one "week" it would not follow that any individual one of these suing employees even so much as touched in the course of any particular *week* any one or more vehicles so used in interstate commerce by some one or another lessee.

Take for instance the situation of the mechanics. Essentially their jobs consisted of heavy duty overhauling periodically after a predetermined number of thousands of miles had been performed by a particular truck of a particular lessee. That kind of heavy duty overhauling on any single truck vehicle takes a number of consecutive days. The vehicles were actually withdrawn from use by the lessees

during those lengthy periods and other vehicles substituted. Consequently there is no more reason to suppose that a given one of these mechanics, during any given previous week, performed heavy duty overhauling job on a truck vehicle which recently had been or subsequently would soon be used by a lessee in its own interstate commerce than that he might have worked a number of consecutive weeks on particular vehicles which *never* had been or ever would be used by a lessee in interstate commerce to any extent whatsoever.

Similarly with regard to greasers. Motor trucks are not greased continuously. A given greaser would not necessarily touch in the course of any given one or another week a vehicle which had been or was being or would soon be used in interstate commerce by a lessee.

The washing of truck vehicles for an owner seems quite remote from the interstate commerce of a lessee of the vehicles. In any event in a given garage there might be stored during a part of each 24 hour period perhaps 50 vehicles. Of those perhaps only 5 will have been in interstate use by a lessee in the course of a given week, accounting for a total of about 25 per cent of the *mileage* of all the 50 truck vehicles stored at that place the distances being greater in interstate than in intrastate use. To "infer" that *each* of the washers in such a garage necessarily worked upon those particular 5 truck vehicles each week consecutively for a number of years would be fanciful.

During the oral argument in the Court below it was remarked from the Bench by Judge Frank that employers would regret a judicial conclusion that would require an employee to identify for each week whether his work in that week concerned interstate commerce. The basis for that suggested regret was that in such event the Administrator of the Wage and Hour Division would likely impose the requirement that such an employer make a recorded segregation.

But no such requirement has heretofore been imposed by the Administrator. Had it in fact been imposed no

doubt the burden of proof resting upon the employees would have been more readily borne by them. But here they failed completely even to try to demonstrate as to any particular week which if any of those employees labored at all upon one or more vehicles which the lessees had been using currently in their own interstate commerce. It was not permissible to supply that evidence in the way the Court below has proposed, i.e. "to infer" the facts. No such "inference" is deserved here any more than it would have been deserved in the previous cases decided on the same point by the 8th and 5th Circuit Courts of Appeal.

Conclusion

It is respectfully urged that the case is one of broad importance under the Fair Labor Standards Act as to which substantial disagreements exist between various of the Circuit Courts of Appeal. Certiorari should, under such circumstances, be granted.

Respectfully,

CHARLES E. COTTERILL,
70 East 45th Street,
New York, N. Y.
Counsel for Petitioner.

Dated: April 7, 1947.